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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

AIG LIFE INSURANCE COMPANY,

Petitioner,

v.

JORITA PADFIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent brought this action under the Employment Retirement Income Security Act of 1974 ("ERISA") to recover accidental death benefits for the death of her husband under a group insurance plan issued by the husband's employer. That plan provided that no benefits would be paid for death from an "intentionally self-inflicted injury." The husband died from "autoerotic asphyxiation"; he had tightened a noose around his neck to restrict the flow of oxygen to the brain while masturbating.

The issue presented is: Did the Court of Appeals correctly rule that, as a matter of the federal common law under ERISA, the decedent's death from voluntary self-strangulation was not caused by an "intentionally self-inflicted injury"?

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

All of the shares of AIG Life Insurance Company are owned directly or indirectly by American International Group, Inc., a publicly held corporation. No parent or publicly held company owns more than 10% of the shares of American International Group, Inc.

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PETITION FOR WRIT OF CERTIORARI

AIG Life Insurance Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. Alternatively, it requests that consideration of this petition be deferred until the Second Circuit has an opportunity to rule on pending appeals in cases where decisions of the district courts squarely conflict with the Ninth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 290 F.3d 1121. The opinion of the District Court (App. 23a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was issued on May 17, 2002. AIG's timely petition for rehearing en banc was denied on July 3, 2002.[1] App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000 ed).

STATUTORY PROVISIONS INVOLVED

The jurisdiction of the District Court was invoked under sections 502(a)(1)(B) and (e)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and (e)(1) (2000 ed.). Those provisions state:

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[1] The Order denying rehearing (App. 33a) states that the rehearing petition was filed on June 6, 2002. The Ninth Circuit docket shows that the petition was timely received on May 31, 2002, but it was not filed until a certificate showing its compliance with the applicable type-volume requirements was received on June 5, 2002.

"§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

STATEMENT OF THE CASE

This is a federal common law case arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. § 1001 *et seq.* Respondent Jorita Padfield brought this action seeking to recover accidental death benefits under an employee benefit plan provided by her late husband's employer. The plan excluded coverage for death from "intentionally self-inflicted

injury or any attempt at intentionally self-inflicted injury." Gerald Padfield died while performing "autoerotic asphyxiation." He had strangled himself with a necktie while masturbating and inhaling an industrial solvent. A divided Court of Appeals ruled, as a matter of federal common law, that his death was not due to an "intentionally self-inflicted injury."

While the facts of the case may seem bizarre, there is a significant and growing body of conflicting case law on whether accidental death benefits may be recovered for death from autoerotic asphyxiation under ERISA-covered plans. Appeals are pending in the Second Circuit raising the same issue. Moreover, there are also a substantial number of conflicting decisions under ERISA concerning whether death from abuse of drugs and alcohol should be considered due to intentionally self-inflicted injury. That case law comes into play because those claims are closely analogous to the claim here. This is particularly so because Mr. Padfield had been inhaling an industrial solvent prior to death, a practice that substantially increased his risk of death.

The value in having the federal common law, rather than state law, govern claims under ERISA plans is lost when the lower courts reach dramatically different results in cases involving the same basic set of facts. The lower courts desperately need guidance in determining when a claim under ERISA for accidental death benefits is due to self-inflicted injury. This Court should grant review to provide that guidance. Alternatively, it should hold this petition until the Second Circuit rules on pending appeals to see if the present conflict between the Ninth Circuit and district courts becomes a conflict between the Ninth Circuit and the Second Circuit.

A. Facts Surrounding Mr. Padfield's Death

On February 9, 1999, Gerald Padfield told his wife that he was going to the cleaners; he never returned. App. 2a, 24a-25a. Three days later, the family van was found by police on a street bounded by vacant lots. Mr. Padfield was found dead in an upright position on the floor behind the front passenger seat with his back against the van's sliding door. He was naked from the waist down. One end of a necktie was tied around his neck, with the other end being tied to the hinge of the van's sliding door, which was located directly above him. The two back seats were folded down, and numerous sexual devices[2] and a back pack were on top of them. The back pack contained pornographic materials and a bottle of an industrial solvent, Chlorohexanol. Another bottle of Chlorohexanol was found nearby. App. 2a, 25a. "When notified of the circumstances surrounding her husband's death, [Mrs. Padfield] told officers that she knew of her husband's sexual devices but thought he had quit using them." App. 2a.

Post-mortem tests found the industrial solvent in Mr. Padfield's blood. App. 2a, 25a. A deep ligature mark was found around his neck. App. 2a. The coroner attributed the death to autoerotic asphyxiation, with the cause of death on the death certificate being "hanging." App. 2a.

Autoerotic asphyxiation is "the practice of using strangulation to enhance the pleasure of masturbating * * *."[3] The American Psychiatric Association categorizes the

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[2] See Excerpts of Record at 30, *Padfield* v. *AIG Life Ins. Co.*, No. 00-57054 (9th Cir.).

[3] Andrew P. Jenkins, *When Self-Pleasuring Becomes Self-Destruction: Autoerotic Asphyxiation Paraphilia*, 3 Int'l Elec. J. Health Educ. 208, 208 (2000), *at* http://www.aahperd.org/iejhe/archive/jenkins.pdf.

practice as a form of sexual masochism and says the following about it:

> "One particularly dangerous form of Sexual Masochism, called 'hypoxyphilia,' involves sexual arousal by oxygen deprivation obtained by means of chest compression, noose, ligature, plastic bag, mask, or chemical (often a volatile nitrite that produces a temporary decrease in brain oxygenation by peripheral vasodilation). Oxygen-depriving activities may be engaged in alone or with a partner. Because of equipment malfunction, errors in the placement of the noose or ligature, or other mistakes, accidental deaths sometimes occur. Data from the United States, England, Australia, and Canada indicate that one to two hypoxyphilia-caused deaths per million population are detected and reported each year."[4]

Other sources estimate the number of deaths from autoerotic asphyxiation in the United States at between 250 and 1,000 per year.[5] If anything, the numbers are probably underreported.[6]

B. Mrs. Padfield's Claims For Accidental Death Benefits

Prior to his death, Mr. Padfield was employed by Raytheon Systems Company, which had established an ERISA-covered employee benefit plan for accidental death or dismemberment. Benefits under that plan were

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[4] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV § 302.83, at 529 (4th ed. 1994) ("DSM-IV").

[5] Jenkins, *supra* note 3, at 208 (citing estimates of between 250 and 1,000); Jane L. Uva, *Review: Autoerotic Asphyxiation in the United States*, 40 J. Forensic Sci. 574, 574 (1995) (same).

[6] Uva, *supra* note 5, at 575.

administered and insured by petitioner AIG Life Insurance Company ("AIG"). Pursuant to the plan, AIG agreed to pay prescribed benefits "[i]f Injury to the Insured Person results in death within 365 days of the date of the accident that caused the Injury * * *." App. 35a. "Injury" is defined as "bodily injury caused by an accident occurring while this Policy is in force as to the person whose injury is the basis of claim and resulting directly and independently of all other causes in a covered loss." App. 34a. The plan, however, excludes from coverage "any loss caused in whole or in part by, or resulting in whole or in part from, * * * suicide or any attempt at suicide or *intentionally self-inflicted injury or any attempt at intentionally self-inflicted injury* * * *." App. 35a (emphasis added).

AIG denied coverage on the basis of the self-inflicted injury exclusion. It asserted that the "insured was voluntarily restricting his air supply as part of a sexual act, which is considered an intentionally self-inflicted injury even if death was not intended."[7] Mrs. Padfield pursued an administrative appeal from this denial. After obtaining advice from independent legal counsel, the plan's ERISA appeal committee upheld the denial.

C. Proceedings In The District Court

Invoking federal question jurisdiction under ERISA §§ 502(a)(1)(B) and (e)(1), Mrs. Padfield brought suit in the U.S. District Court for the Central District of California to recover accidental death benefits under the Raytheon plan. On cross-motions for summary judgment, the District Court granted judgment in favor of AIG and dismissed Mrs. Padfield's complaint. App. 23a.

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[7] Excerpts of Record at 34, *Padfield* v. *AIG Life Ins. Co.*, No. 00-57054 (9th Cir.).

The court first determined that, because the Raytheon plan did not provide the plan administrator with discretion in construing its terms, the court should employ a *de novo* standard of review. App. 24a, *citing Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-15 (1989). It further ruled, also citing *Firestone*, that "the federal common law * * * govern[s] questions of insurance policy interpretation under ERISA regulated plans." App. 24a.

The court considered, but rejected, AIG's argument that Mr. Padfield's death should not be considered accidental. App. 26a-29a. It then accepted AIG's contention that the death fell within the policy's exclusion for self-inflicted injury. Following *Sims* v. *Monumental General Insurance Co.*, 960 F.2d 478 (5th Cir. 1992), it concluded that "a reasonable jury must find that a partial strangulation is an injury." App. 29a. Indeed, it noted that "Mrs. Padfield does not contest that partial strangulation is an injury." App. 30a. Although Mrs. Padfield asserted that, under the doctrine of *contra proferentem*, "ambiguities in the policy should be construed against the insurance company,"[8] the court found that the "clause at issue, 'intentionally self-inflicted injury' is not ambiguous." App. 30a.

D. Proceedings In The Court Of Appeals

A divided Court of Appeals reversed. App. 1a. The court agreed with the District Court that the denial of benefits was to be reviewed *de novo* under the federal common law. App. 4a. It further agreed with the District Court in rejecting AIG's argument that Mrs. Padfield's claim should be denied

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[8] *Contra proferentem* is the "doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter." Black's Law Dictionary 328 (7th ed. 1999).

on the ground that Mr. Padfield's death was not accidental or that his conduct was tantamount to suicide. App. 6a-9a.[9]

The majority in the Court of Appeals, however, disagreed with the District Court's conclusion that coverage was excluded because Mr. Padfield's death was due to an "intentionally self-inflicted injury." App. 9a-14a. It stated that the "district court correctly observed that this case hinges on whether the physical consequences that Mr. Padfield intended were injuries. If they were injuries, and if they led to his death, the exclusion applies, and AIG correctly denied benefits." App. 12a. The Court of Appeals stated that this issue should be decided employing the "subjective/objective test." App. 11a. Using that test, the court examined both whether the decedent subjectively expected death and whether a reasonable person "would have viewed the resulting injury or death as substantially certain * * *." App. 7a. It then ruled that that the results that Mr. Padfield intended to achieve were not an "injury":

> "[I]f the events of February 9, 1999 had gone as Mr. Padfield intended, he would have experienced a temporary deprivation of oxygen, a euphoric light-headedness from the exposure to the industrial solvent, and an intensified sexual experience. His oxygen level would then have been restored, his

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[9] The Court of Appeals cited (App. 9a) in support of this ruling: *Todd* v. *AIG Life Ins. Co.*, 47 F.3d 1448, 1456-57 (5th Cir. 1995) (Justice White, sitting by designation); *Bennett* v. *Am. Int'l Life Assurance Co.*, 956 F. Supp. 201, 212-13 (N.D.N.Y. 1997); *Parker* v. *Danaher Corp.*, 851 F. Supp. 1287, 1295 (W.D. Ark. 1994); and *Fawcett* v. *Metro. Life Ins. Co.*, No. C-3-97-540, 2000 U.S. Dist. LEXIS 10061, at *16-*17, 2000 WL 979994 (S.D. Ohio June 28, 2000). The court stated that it did not agree with certain non-ERISA decisions under state law ruling that deaths from autoerotic asphyxiation were not accidental. App. 9a n.1, *citing Sigler* v. *Mut. Benefit Life Ins. Co.*, 663 F.2d 49, 50 (8th Cir. 1981) (applying Iowa law); *Int'l Underwriters, Inc.* v. *Home Ins. Co.*, 662 F.2d 1084, 1087 (4th Cir. 1981) (applying Virginia law).

> euphoric state would have subsided, and he would have returned home uninjured. None of these consequences is an 'injury' as that term is defined in the 'ordinary and popular sense [by] persons of average intelligence and experience.'" App. 12a (citation omitted).

In reaching this result, the majority acknowledged that all four of the previous decisions under ERISA had ruled that death from autoerotic asphyxiation is due to an intentionally self-inflicted injury. App. 11a. In two of these cases, the plan had given the administrator discretion to apply its terms,[10] and the reviewing courts had ruled that "plan administrators did not act arbitrarily and capriciously in precluding recovery under 'intentionally self-inflicted injury' exclusions in cases of autoerotic asphyxiation." App. 11a, *citing Hamilton* v. *AIG Life Ins. Co.*, 182 F. Supp. 2d 39, 49-50 (D.D.C. 2002), *appeal pending*, No. 02-7021 (D.C. Cir.); *Fawcett* v. *Metro. Life Ins. Co.*, No. C-3-97-540, 2000 U.S. Dist. LEXIS 10061, at *26, 2000 WL 979994, at *4 (S.D. Ohio June 28, 2000). The remaining two cases, like this one, involved courts applying a *de novo* standard of review. In them, the district courts "held that an insured's death while engaging in autoerotic asphyxiation was excluded under provisions similar to the 'intentionally self-inflicted injury' provision in this case." App. 11a, *citing Critchlow* v. *First Unum Life Ins. Co. of Am.*, 198 F. Supp. 2d 318, 325 (W.D.N.Y. 2002), *appeal pending*, No. 02-7585 (2d Cir.); *Cronin* v. *Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29, 39 (S.D.N.Y. 2002), *appeal pending*, No. 02-7297 (2d Cir.). The majority, however, also noted that some, but not all, of the cases decided under state law had ruled in favor of

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[10] As the Court ruled in *Firestone*, 489 U.S. at 115, if the benefit plan gives the administrator discretion, the reviewing court determines whether that discretion has been abused or, stated alternatively, whether the decision was arbitrary and capricious.

claimants, finding that death from autoerotic asphyxiation was not self-inflicted.[11]

Applying a *de novo* standard of review, the majority decided to "agree with the courts that have held that autoerotic asphyxiation is not an intentionally self-inflicted injury." App. 11a. Although the court acknowledged that "events did not go as Mr. Padfield intended," *id.*, it nonetheless concluded that the injuries that caused his death were not "intentionally self-inflicted." App. 12a. It found that "Mr. Padfield had no subjective intent to cause the injuries that resulted in his death." *Id.* It further found that "suppositions underlying [his] subjective intent were objectively reasonable." *Id.* The court ruled that a "reasonable person with background and characteristics similar to Mr. Padfield's would not have viewed the strangulation injury that resulted in his death as 'substantially certain' to result from his conduct." *Id.*

Judge Leavy dissented from this ruling. He "would hold, as a matter of law, that Mr. Padfield's act of tying a necktie around his neck with the intent to restrict the flow of oxygen to his brain was an intentionally self-inflicted injury which resulted in his death." App. 14a. That conclusion was based on the fact that "Mr. Padfield intended to restrict the flow of oxygen to his brain by self-asphyxiation with a necktie."

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[11] App. 10a. As the court noted, two courts applying state law had ruled that deaths from autoerotic asphyxiation did not result from self-inflicted injury. *Id.*, *citing Conn. Gen. Life Ins. Co.* v. *Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981, writ ref'd n.r.e.); *Am. Bankers Ins. Co.* v. *Gilberts*, 181 F.3d 931 (8th Cir. 1999) (Minnesota law). Two circuit court decisions under state law, however, had disagreed. App. 10a, *citing Sims* v. *Monumental Gen. Ins. Co.*, 960 F.2d 478, 480 (5th Cir. 1992) (holding under Louisiana law that "partial strangulation" during autoerotic asphyxiation is an injury in and of itself and that an "intentionally self-inflicted injury" exclusion precludes recovery); *Sigler* v. *Mut. Benefit Life Ins. Co.*, 663 F.2d 49, 50 (8th Cir. 1981) (same under Iowa law).

App. 16a. According to Judge Leavy: "This intentional act inflicted an injury from which Mr. Padfield never recovered. * * * Mr. Padfield's intentional act of injuring his brain rendered it incapable of functioning * * * [and] incapable of saving him from death. This is an intentionally self-inflicted injury which resulted in death." *Id.* Judge Leavy further noted that, not only was the majority decision contrary to the four ERISA decisions that had faced the issue, but it was also contrary to "[t]hree additional ERISA cases analyz[ing] accidental insurance coverage for death from autoerotic asphyxiation and stat[ing], in dicta, that coverage *would have been denied* had the policy contained an exclusion for intentionally self-inflicted injuries." App. 19a (emphasis in original), *citing Todd* v. *AIG Life Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995); *Bennett* v. *Am. Int'l Life Assurance Co.*, 956 F. Supp. 201 (N.D.N.Y. 1997); *Parker* v. *Danaher Corp.*, 851 F. Supp. 1287 (W.D. Ark. 1994).[12]

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit that Mr. Padfield's death was not due to an intentionally self-inflicted injury defies both common sense and the common understanding of what is an "intentionally self-inflicted injury." That decision is therefore plainly erroneous. It also creates a significant conflict in the federal case law under ERISA, for it is contrary to every other ERISA decision concerning whether death from autoerotic asphyxiation is due to an intentionally self-inflicted injury. The Ninth Circuit's decision, moreover, exacerbates a more general conflict among lower courts on whether death from risky, self-abusive behavior, including abuse of drugs and alcohol, should be considered death from intentionally self-inflicted injury. The morass of conflicting decisions under ERISA involving essentially identical factual

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[12] Judge Leavy also argued that the non-ERISA case law did not support the majority's rulings. App. 20a-22a.

circumstances calls out for guidance from this Court. This is particularly so given the popularity of employee benefit plans providing accidental death benefits and the fact that many, if not most of them, contain exclusions for "intentionally self-inflicted injury."[13]

I. The Ninth Circuit Has Reached An Erroneous Result With Broad Implications For Claims For Accidental Death Benefits Involving Intentional, Self-Abusive Conduct.

A. The Decision Of The Court Of Appeals Is Plainly Erroneous.

The decision of the Ninth Circuit in this case is plainly wrong. It purported to rest its decision on the proposition that the terms of the AIG policy should be interpreted "'in an ordinary and popular sense as would a person of average intelligence and experience.'" App. 4a (citation omitted). So far as it goes, that principle is unobjectionable, for no single legal formula for determining what is an "accident" or what is "intentionally self-inflicted injury" is likely to be successful.[14]

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[13] Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 Iowa L. Rev. 173, 294 (2000), states that "[v]irtually all accident policies exclude deaths resulting from 'intentionally self-inflicted injury.'" The case law suggests that "virtually all" might be too sweeping, but the exclusion plainly is widely used.

[14] As Judge Posner noted in *Senkier* v. *Hartford Life & Accident Insurance Co.*, 948 F.2d 1050, 1052 (7th Cir. 1991), Justice Cardozo believed that tests to define what is an "accident" are "no good." Cardozo thought "courts could do no better than to leave the question to 'common understanding as revealed in common speech.'" *Id.* at 1052, *quoting Connelly* v. *Hunt Furniture Co.*, 240 N.Y. 83, 85, 147 N.E. 366, 367 (1925). Judge Posner agreed, stating that a "lay person has a clear if inarticulate understanding of the difference between an accidental death and a death from illness, and that understanding will not be altered or

The problem is that the Ninth Circuit's decision is manifestly contrary to the "ordinary and popular sense" of the words "intentionally self-inflicted injury." The average lay person would surely agree with the court's observation in *Critchlow* v. *First Unum Life Insurance Co. of America,* 198 F. Supp. 2d 318 (W.D.N.Y. 2002), *appeal pending*, No. 02-7585 (2d Cir.):

> "That one *may* survive autoerotic asphyxiation without suffering any major injury is not dispositive, however. The fact remains that autoerotic asphyxiation, as practiced by decedent, requires not just a slight amount of pressure, or a negligible reduction of the flow of oxygen, but a significant deprivation of oxygen to the brain—in other words, strangulation. *Any definition of 'injury' that excludes strangulation—whether fatal or not—is simply unreasonable.*" 198 F. Supp. 2d at 327 ("may" italicized by court; remainder of emphasis added).[15]

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improved by head-spinning judicial efforts at definition * * *." 948 F.2d at 1053.

[15] The Fifth Circuit in *Sims* v. *Monumental General Insurance Co.*, 960 F.2d 478 (5th Cir. 1992), a case decided under Louisiana law, put the matter this way:

> "Partial strangulation is an injury in and of itself. His death 'resulted directly or indirectly, wholly or partly from' that intentionally self-inflicted injury.
>
> "An analogy is helpful. If Mr. Brumfield had been a member of a fraternal organization that required him to brand his forearm, and he did so, any loss arising from the branding would be excluded. For instance, although he only intended to burn the insignia of the organization onto his skin, he might unintentionally burn into his muscle and do serious damage to his arm. He intended some injury, but another, unintended injury resulted. The loss would not be covered by the policy at issue here." *Id.* at 480.

The Ninth Circuit's ruling mistakes the transient, temporary injury to the body that Mr. Padfield intended to inflict upon himself for no injury to the body at all. Its reading contravenes the plain language of the plan. The plan does not say that the covered person must have intentionally inflicted serious injury upon himself or intentionally inflicted permanent injury upon himself. It excludes *any* death resulting "in whole or in part" from an "intentionally self-inflicted injury." Mr. Padfield's death unquestionably resulted in whole or in part from his intentional act of self-strangulation. If he had not inflicted that injury upon himself, his death would not have occurred.

The Court of Appeals correctly started its analysis by stating that the issue was whether Mr. Padfield's self-inflicted injury "led to his death" (App. 12a), but it then erroneously ruled that the question turned on whether death was "substantially certain" to result from his intentional acts. App. 12a. By inserting this additional requirement into the exclusion for "intentionally self-inflicted injury," the court conflated the basic requirement that the death be due to an "accident" with the exclusion from coverage for "intentionally self-inflicted injury." As the court itself earlier ruled (App. 7a-8a), if death had been a "substantially certain" result of Mr. Padfield's actions, his death would not have been "accidental" at all.

The Court of Appeals in effect has treated the exclusion for self-inflicted injury as surplusage. Under its ruling the only way that AIG could have avoided paying accidental death benefits would be to prove that Mr. Padfield in effect intended suicide. That is not only an unreasonable reading of the plan, but it also conflicts with the dicta in other decisions, such as *Todd* v. *AIG Life Insurance Co.*, 47 F.3d 1448 (5th Cir. 1995), that benefits for death from autoerotic asphyxiation should be denied if the policy contains an exclusion for self-inflicted injury. *Id.* at 1454 n.6.

B. The Ninth Circuit's Decision Has Ramifications For Claims Involving Other Types Of Self-Abusive Behavior.

The implications of the Ninth Circuit's decisions are not limited to *de novo* review of accident benefit claims involving death from peculiar, risky sexual practices. Claims involving death from other forms of risky, self-abusive behavior will also be affected by the Ninth Circuit's decision, including abuse of drugs and alcohol. Indeed, although mentioned only in passing by the Court of Appeals, this case did involve drug abuse. Mr. Padfield had been inhaling an industrial solvent (App. 2a)—a practice that substantially increased the risk of sudden death from autoerotic asphyxiation.[16] More generally, cases involving death from misuse of drugs are directly analogous to those involving death from autoerotic asphyxiation, as the Court of Appeals itself acknowledged. See p. 20 *infra*. In both instances, the decedent was intentionally undertaking dangerous behavior for transitory pleasure that causes, at a minimum, temporary injury to the brain (oxygen deprivation in the case of autoerotic asphyxiation and intoxication in the case of drug use). In both instances, the decedent may have expected to recover fully afterwards, but had gone too far, either by continuing the restriction on the flow of blood to the brain too long or by overdosing on drugs.

In short, the decision of the Ninth Circuit in this case has obvious ramifications for how courts should treat the more numerous claims for alleged "accidental" deaths from drug and alcohol abuse and other forms of self-abusive behavior. In fact, as shown in Part II.B. below, its decision conflicts with the majority of decisions involving drug abuse under ERISA plans. Future claimants can be expected to argue that the Ninth Circuit's decision requires decision in their favor.

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[16] See Jenkins, *supra* note 3, at 209.

These broader implications cannot simply be cured by amending plans to give administrators discretion in construing ERISA benefit plans. The Ninth Circuit's decision was based on its interpretation of the ordinary meaning of the terms of the Raytheon benefits plan, and plan administrators will have to take the decision into account in construing their plans, lest they be found to have abused their discretion.[17]

Nor can the problem be dealt with if insurers merely adopt more detailed exclusions. Such suggestions "reflect ignorance about how such exclusions have historically been nullified * * *."[18] As noted in Part I.A. above, the Court of Appeals essentially nullified the exclusion for self-inflicted injury in this case. More fundamentally, any listing of the specific conduct being excluded as being "intentionally self-inflicted injury" will inevitably be under-inclusive. No policy of reasonable length can hope to capture all the variety, if not to say the perversity, of human behavior regarding self-inflicted injury. Those whose particular form of abuse is not mentioned will inevitably argue that their claim is not excluded, even though the ordinary person would understand the behavior in question to be "intentionally self-inflicted injury."

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[17] The Ninth Circuit based its decision on the plain language of the plan. The lower courts have ruled that administrators abuse their discretion, or probably have abused their discretion, when their decisions are at odds with the plan's plain language. See, *e.g.*, *Lain* v. *UNUM Life Ins. Co.*, 279 F.3d 337, 346 (5th Cir. 2002); *Skretvedt* v. *E.I. DuPont de Nemours & Co.*, 268 F.3d 167, 177 (3d Cir. 2001).

[18] Scales, *supra* note 13, at 300 (footnote omitted).

II. The Ninth Circuit's Decision Exacerbates The Conflict In The Case Law On Whether Deaths From Self-Abusive Practices Are Due To Intentionally Self-Inflicted Injury.

Without question, the activity that Mr. Padfield was engaged in was, as the American Psychiatric Association states, a "particularly dangerous form of Sexual Masochism."[19] Hundreds, if not thousands, of men die annually from it.[20] It is not, however, the only self-abusive practice that carries with it a substantial possibility of death. As noted, abuse of drugs and alcohol are obvious other examples of such self-destructive behavior. A majority of ERISA decisions consider deaths from such forms of reckless behavior to be "accidental" deaths, but some do not. In ERISA cases where the plan contains an exclusion for deaths from an intentionally self-inflicted injury, the great majority of courts have ruled that deaths from drug and alcohol abuse are self-inflicted; but some courts disagree. The decision of the Court of Appeals therefore creates a conflict where none existed on ERISA decisions involving death from autoerotic asphyxiation. It also aggravates the pre-existing conflict in decisions involving drug and alcohol abuse.

A. The Ninth Circuit's Decision Creates A Conflict Where None Previously Existed On Whether Death From Autoerotic Asphyxiation Is Due To Self-Inflicted Injury.

With particular reference to deaths from autoerotic asphyxiation, the decision of the court below has created a conflict among ERISA decisions where none existed before. Until the decision in this case, all of the decisions, whether

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[19] DSM-IV, *supra* note 4, at 529.

[20] See authorities cited in note 5 *supra*.

under a *de novo* or abuse of discretion standard of review, had denied coverage for death from autoerotic asphyxiation when there was an exclusion for intentionally self-inflicted injury. *Critchlow* v. *First Unum Life Ins. Co. of Am.*, 198 F. Supp. 2d 318, 323-27 (W.D.N.Y. 2002) (*de novo* review), *appeal pending*, No. 02-7585 (2d Cir.); *Cronin* v. *Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29, 37-40 (S.D.N.Y. 2002) (*de novo* review), *appeal pending*, No. 02-7297 (2d Cir.); *Hamilton* v. *AIG Life Ins. Co.*, 182 F. Supp. 2d 39, 49-50 (D.D.C. 2002) (abuse of discretion review), *appeal pending*, No. 02-7021 (D.C. Cir.); *Fawcett* v. *Metro. Life Ins. Co.*, No. C-3-97-540, 2000 WL 979994, 2000 U.S. Dist. LEXIS 10061, at *17-*28 (S.D. Ohio June 28, 2000) (abuse of discretion review). Moreover, as Judge Leavy noted in his dissent, App. 19a-20a, other cases had assumed in dicta that deaths from autoerotic asphyxiation would have been excluded if the policies in those cases had contained an exclusion for intentionally self-inflicted injuries.[21]

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[21] Although AIG does not raise the issue in this petition, it is worth noting that there is even a conflict on whether death from autoerotic asphyxiation should be deemed "accidental." Most cases under ERISA have found such deaths to be due to an "accident." See, *e.g.*, *Todd* v. *AIG Life Ins. Co.*, 47 F.3d at 1456-57; *Fawcett* v. *Metro. Life Ins. Co.*, 2000 U.S. Dist. LEXIS 10061, at *15-*17; *Parker* v. *Danaher Corp.*, 851 F. Supp. at 1295. But the court in *Cronin* v. *Zurich American Insurance Co.*, 189 F. Supp. 2d at 37, based its denial of the claim in part on the ground that "death from self-strangulation is not 'accidental.'" Moreover, the court in *Bennett* v. *American International Life Assurance Co.*, 956 F. Supp. at 212, ruled that the question could not be decided on summary judgment at all, but rather had to be tried. The position that death from autoerotic asphyxiation is not "accidental" is also supported by significant precedent under state law. See, *e.g.*, *Sigler* v. *Mut. Benefit Life Ins. Co.*, 506 F. Supp. 542, 544-45 (S.D. Iowa 1981), *aff'd per curiam*, 663 F.2d 49, 50 (8th Cir. 1981) (Iowa law); *Int'l Underwriters, Inc.* v. *Home Ins. Co.*, 662 F.2d 1084, 1087 (4th Cir. 1981) (Virginia law).

The conflict between the decision of the Ninth Circuit and other decisions concerning this issue cannot be explained away on the basis of there being material differences in the language employed in the benefits plans. Nor can it be explained away by differences in the underlying facts. In all of these cases, as here, it was assumed that the decedent had not intended to kill himself. Moreover, it was agreed (as was the case here, App. 12a) that, if events had gone as decedent intended, he would have recovered with seemingly no permanent ill effects. See, *e.g.*, *Cronin*, 189 F. Supp. 2d at 37. The cases differ dramatically, however, in their conclusion on whether autoerotic asphyxiation is a self-inflicted injury. As *Cronin* stated: "A reasonably intelligent person would conclude that the 'purposely self-inflicted injury exclusion' applies to situations where the policyholder causes a wrong to the integrity of his own body to cause himself 'suffering or mischief willfully and unjustly inflicted.'" *Id.* at 39 (quoting Oxford English Dictionary Online).

Concededly, the Ninth Circuit decision on the specific issue of autoerotic asphyxiation only conflicts with decisions of district courts, and not with decisions of courts of appeals. But AIG could not wait for appellate decisions in those cases before filing this petition for certiorari. If the Court believes that it cannot grant this petition in the absence of a conflict in the circuits, AIG respectfully requests that it defer consideration on this petition until the Second Circuit has decided the appeals in *Critchlow* and *Cronin*, which like this case involve *de novo* review of denial of benefits on the ground that death from autoerotic asphyxiation is due to an intentionally self-inflicted injury. Stern and Gressman note that, in this circumstance, the "Court might * * * defer consideration until after a decision has been rendered by the other circuit to determine whether a conflict will emerge,

provided the decision is reasonably imminent."[22] Decisions in those cases are reasonably imminent. *Critchlow* and *Cronin* could be argued in December 2002 and January 2003, respectively.[23] Thus, the appeals in those case should be decided within this Term. Counsel for petitioner will, of course, keep the Court apprised on any developments on those appeals.

B. The Ninth Circuit's Decision Aggravates A Pre-Existing Conflict On Whether Death From Self-Abusive Behavior Is Due To Intentionally Self-Inflicted Injury.

As discussed above, the Ninth Circuit's decision also has implications for accident insurance claims involving other forms of intentional, reckless behavior, such as the misuse of drugs and alcohol. The majority in the Court of Appeals recognized this analogy; it claimed that this case is "analytically identical" to a case involving a drug overdose death. App. 13a, *citing Santaella* v. *Metro. Life Ins. Co.*, 123 F.3d 456, 463 (7th Cir. 1997). But the facts of *Santaella* are materially different from those in this case. There the decedent had died from an overdose of the prescription painkiller propoxyphene ("Darvon"). 123 F.3d at 459. The record showed that the level in her blood was "fairly low" for a fatal overdose and that the "margin between a therapeutic dose and a lethal one is smaller in propoxyphene than in many other drugs * * *." *Id.* at 464. The unrebutted

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[22] Robert L. Stern et al., Supreme Court Practice, at 239 (8th ed. 2002).

[23] The scheduling orders in *Critchlow* and *Cronin* show that those cases could be argued "as early as" the weeks of October 28, 2002, and November 4, 2002, respectively. Counsel in those cases, however, have informed us that, because of scheduling conflicts, the cases are not likely to be argued until December or January. Argument in *Hamilton*, which involves an abuse of discretion review from denial of benefits, is scheduled for February 27, 2003.

testimony was that the amount that the decedent took "is usually indicative of an accidental overdose." *Id.* at 465. In short, in *Santaella* "nothing in the record indicate[d] that [the decedent] intended to take an overdose or that she intended to inflict injury on herself." *Id.*

There is a vast difference between what happened in *Santaella* and what happened here. The decedent in *Santaella* presumably intended by her acts to improve her health. Mr. Padfield, by contrast, set out to intoxicate his brain by inhaling a solvent and then to deprive it of oxygen through self-strangulation.

The great majority of the cases involving drug and alcohol fatalities that *are* on point conflict with the Ninth Circuit's decision. They hold that deaths from overdoses of drugs and alcohol are from an intentionally self-inflicted injury even though the decedent did not intend to cause permanent injury to himself. See, *e.g.*, *Gerdes* v. *John Hancock Mut. Life Ins. Co.*, 199 F. Supp. 2d 861, 865 (C.D. Ill. 2001) (death from cocaine intoxication is from self-inflicted injury: "it is not determinative that the plaintiff did not mean to commit suicide; but rather a reasonable person would have known that taking the drug could cause injury"); *Holsinger* v. *New England Mut. Life Ins. Co.*, 765 F. Supp. 1279, 1282 (E.D. Mich. 1991) (finding that overdose death from intentional misuse of cocaine was the result of a self-inflicted injury; "decedent, a pharmacist and long time drug abuser knew the drugs could [depress bodily functions]. It is irrelevant that decedent may have believed * * * he would not die * * *.").[24] There are, however, cases going the other

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[24] Accord, *e.g.*, *Bevans* v. *Iron Workers' Tri-State Welfare Plan*, 971 F. Supp. 357 (C.D. Ill. 1997) (liver damage from intentional overdose of Tylenol combined with alcohol is self-inflicted); *McLain* v. *Metro. Life Ins. Co.*, 820 F. Supp. 169 (D.N.J. 1993) (death from cocaine). An unpublished decision of the Eighth Circuit sums up the attitude of those majority cases finding that death or injury from misuse of drugs are self-inflicted even though no permanent injury was intended: "The * * *

way. See, *e.g.*, *Schadler* v. *Anthem Life Ins. Co.*, No. 3:95-CV-1044-D, 1999 U.S. Dist. LEXIS 17930 (N.D. Tex. Nov. 18, 1999) (holding that plan administrator abused discretion in finding that exclusion for self-inflicted injury applies to decedent's "lethal ingestion of illegal drugs").

Moreover, many courts, including the Seventh Circuit, have gone a causal step beyond a simple overdose case to reject coverage for claims arising out of automobile collisions when the insured was intoxicated. In *Cozzie* v. *Metropolitan Life Insurance Co.*, 140 F.3d 1104 (7th Cir. 1998), the Seventh Circuit upheld the administrator's determination that such a death was not even accidental: "[G]iven the amount of alcohol ingested here and the exclusion of any other cause for the accident, we cannot say that it was arbitrary and capricious for MetLife to determine that this particular vehicular death was no 'accident.'" *Id.* at 1111. Other cases have also ruled, under both the *de novo* and arbitrary and capricious standards of review, that the death of intoxicated automobile drivers results from self-inflicted injury. See, *e.g.*, *Mullaney* v. *Aetna U.S. Healthcare*, 103 F. Supp. 2d 486, 495 (D.R.I. 2000) (in *de novo* review case, court rules, in the alternative, that "any injuries or death resulting from driving while intoxicated can be classified as 'intentionally self-inflicted.'"); *Cates* v. *Metro. Life Ins. Co.*, 14 F. Supp. 2d 1024, 1027 (E.D. Tenn. 1996) (employing arbitrary and capricious standard of review; death while driving drunk is not accidental), *aff'd per curiam*, 1998 U.S. App. LEXIS 14975 (6th Cir. 1998); *Schultz* v. *Metro. Life Ins. Co.*, 994 F. Supp. 1419, 1421 (M.D. Fla. 1997) (same result in case under arbitrary and capricious standard of review); *Nelson* v. *Sun Life Assurance*

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argument that [plaintiff] intended only to hallucinate, not to get sick, is a distinction without a difference." *Fee* v. *Sheet Metal Workers Local 263*, 6 Fed. Appx. 560, 561, 2001 U.S. App. LEXIS 11551, *3 (8th Cir. June 4, 2001).

Co. of Canada, 962 F. Supp. 1010, 1013 (W.D. Mich. 1997) (same result). On the other side, however, some courts have ruled that deaths while driving drunk are "accidental" and not due to "intentionally self-inflicted injury." See *West* v. *Aetna Life Ins. Co.*, 171 F. Supp. 2d 856 (N.D. Iowa 2001) (employing arbitrary and capricious standard of review, court rules that death not accidental); *Ayers* v. *Maple Press Co.*, 168 F. Supp. 2d 349 (M.D. Pa. 2001) (employing arbitrary and capricious standard, court rules that death is not self-inflicted).

C. The Court Should Grant Review To Curb The Disarray In The Lower Court Decisions.

The short of it is that the decisions of the lower federal courts are in disarray, reaching conflicting results on essentially the same facts. This Court ruled that federal common law should be applied in ERISA cases so that there would be a "'uniformity of decision.'" *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987), *quoting* H.R. Rep. No. 93-533, at 12 (1973). That goal is being thwarted in cases involving accidental death benefit claims where the plan participant engaged in self-abusive conduct immediately prior to death. Plan administrators, as well as lawyers for claimants, need to know whether, under the federal common law, death from autoerotic asphyxiation is an "accident" or whether it is due to "intentionally self-inflicted injury." Yet, as shown in Part II.A., the decisions are in conflict on this point. The case law is similarly in conflict on the question of whether death from misuse of alcohol and drugs is an "accident" or due to an "intentionally self-inflicted injury." See Part II.B. *supra*. There ought likewise to be a uniform answer on that question.

The lower courts need guidance on how cases raising these issues should be resolved. The Court should grant review to provide that guidance.

CONCLUSION

The Court should grant the petition for writ of certiorari. Alternatively, it should defer action on this petition until Second Circuit decides the pending appeals in the *Critchlow* and *Cronin* cases.

Respectfully submitted,

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APPENDICES

Appendix A: Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-57054

JORITA PADFIELD,

Plaintiff-Appellant,

v.

AIG LIFE INSURANCE COMPANY,

a Corporation,

Defendant-Appellee.

Argued and Submitted December 6, 2001 — Pasadena, California

Filed May 17, 2002

Before: Edward Leavy, Thomas G. Nelson and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher; Partial Concurrence and Partial Dissent by Judge Leavy.

W. FLETCHER, *Circuit Judge*:

This suit for recovery of benefits under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., arises from the death of appellant's husband as a result of autoerotic asphyxiation. The insurer refused to pay benefits under an accidental injury and death insurance policy governed by ERISA. The district court held that the death was caused by an intentionally self-inflicted injury, and thus was not covered by the policy. We reverse.

I. Facts

The relevant facts are not in dispute. On the evening of February 9, 1999, Gerald Alan Padfield told his wife he was going to the cleaners and drove away from his home in the family's van. He never returned. Three days later, a California Highway Patrol trooper noticed the van parked on an empty street next to a vacant lot. When he approached the van, he discovered Mr. Padfield dead on the back-seat floor. According to the coroner's report, Mr. Padfield was found sitting in an upright position behind the front passenger seat with his back against the sliding door. He was naked from the waist down. One end of a necktie was tied around his neck. The other end was tied to the sliding door hinge, which was located directly above him. The two back seats were folded down, and on top of them were numerous sexual devices and a backpack. Inside the backpack were pornographic materials and a small bottle containing a liquid later identified as Chlorohexanol, an industrial solvent. Another bottle of the liquid was nearby.

Post-mortem tests found the industrial solvent in Mr. Padfield's blood. The coroner reported that he found no trauma other than a deep ligature mark around the neck. The report stated that the death appeared to be the "accidental" result of autoerotic asphyxiation. The death certificate listed the cause of death as "hanging." Mr. Padfield's wife, who had filed a missing person report when her husband had failed to return from the cleaners, said that there were no personal problems at home and that "everything appeared to be fine." When notified of the circumstances surrounding her husband's death, she told officers that she knew of her husband's sexual devices but thought he had quit using them.

Mrs. Padfield, the appellant, was the beneficiary of an ERISA-governed accidental death insurance policy that covered Mr. Padfield. Appellee AIG Life Insurance Company (AIG) issued the policy as part of an employee

benefits plan with Raytheon Systems Company, where Mr. Padfield worked. Mrs. Padfield claimed benefits under the policy, listing the cause of death as "accidental death by hanging." The policy provides for an "accidental death benefit" to be paid "if Injury to the Insured Person results in death within 365 days of the date of the accident that caused the Injury." "Injury" under the policy is defined as "bodily injury caused by an accident while this Policy is in force as to the person whose injury is the basis of the claim and resulting directly and independently of all other causes in a covered loss." The policy also contains the following exclusion:

> This Policy does not cover any loss caused in whole or in part by, or resulting in whole or in part from, . . . suicide or any attempt at suicide or intentionally self-inflicted injury or any attempt at intentionally self-inflicted injury.

AIG invoked this exclusion and rejected the claim.

After pursuing an unsuccessful administrative appeal, Mrs. Padfield filed a complaint in the district court under ERISA, seeking benefits under the policy. Both parties filed motions for summary judgment. The district court granted AIG's motion and denied Mrs. Padfield's motion. It held that Mr. Padfield's death by autoerotic asphyxiation fell outside the policy exclusion for suicide, but fell within the exclusion for death resulting from "intentionally self-inflicted injury." Mrs. Padfield appeals both the denial of her motion and the granting of AIG's motion.

II. Standard of Review and Applicable Legal Principles

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Ordinarily, the denial of summary judgment is not a final order and is thus unappealable. *See Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n.20 (9th Cir.

1988). However, an order denying summary judgment is reviewable when, as is the case here, it is coupled with a grant of summary judgment to the opposing party. *Id.*; *see also United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000). We review both a denial and grant of summary judgment de novo. *See Alameda Gateway*, 213 F.3d at 1164.

A denial of benefits under an ERISA-governed plan is reviewed under a de novo standard "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989); *see also Ingram v. Martin Marietta Long Term Disability Income Plan*, 244 F.3d 1109, 1112 (9th Cir. 2001). It is undisputed that the plan at issue in this case does not give the administrator such discretion. Thus, we review the administrator's determination de novo.

When faced with questions of insurance policy interpretation under ERISA, federal courts apply federal common law. *Firestone*, 489 U.S. at 110; *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 98, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983) (holding that federal common law of ERISA preempts state law in the interpretation of ERISA benefit plans). Under the federal common law of ERISA, we "interpret terms in ERISA insurance policies in an ordinary and popular sense as would a person of average intelligence and experience." *Babikian v. Paul Revere Life Ins. Co.*, 63 F.3d 837, 840 (9th Cir. 1995) (internal quotations and citation omitted). As we develop federal common law to govern ERISA suits, we may "borrow from state law where appropriate, and [be] guided by the policies expressed in ERISA and other federal labor laws." *Id.* (internal quotations and citation omitted).

III. Autoerotic Asphyxiation

Autoerotic asphyxiation is "the practice of limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure." *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1450 (5th Cir. 1995). The undisputed evidence indicates that Mr. Padfield engaged in the most common form of this behavior, in which the reduction in oxygen is achieved with the application of pressure to the veins carrying blood out of the head. *See Am. Bankers Ins. Co. of Florida v. Gilberts*, 181 F.3d 931, 933 (8th Cir. 1999). This method requires minimal pressure on the neck. It "essentially keeps blood from leaving the brain, which continues to use oxygen until the oxygen in the blood is depleted enough to give the desired euphoric effect." *Id.* The asphyxial state stimulates nerve centers in the brain, and produces a state of hypercapnia (an increase in carbon dioxide in the blood) and a concomitant state of hypoxia (a decrease in oxygen in the blood), all of which result in an increased intensity of sexual gratification. *See Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199, 202 (Texas Ct. App. 1981); *Sims v. Monumental Gen. Life Ins. Co.*, 778 F. Supp. 325, 326 n.1 (E.D. La. 1991). Industrial solvents like the one found near Mr. Padfield are also used to contribute to, or bring about, the same effect. *See Bennett v. Am. Int'l Life Assurance Co. of N.Y.*, 956 F. Supp. 201, 204 (N.D.N.Y. 1997) (quoting the Diagnostic and Statistical Manual of the American Psychiatric Association Fourth Edition (DSM-IV), which describes the practice of autoerotic asphyxiation, or "hypoxyphilia," as involving "sexual arousal by oxygen deprivation obtained by means of chest compression, noose, ligature, plastic bag, mask, or chemical (often a volatile nitrate that produces a temporary decrease in brain oxygenation by peripheral vasodilation)").

Autoerotic asphyxiation can result in death, as it did in this case. "Because of equipment malfunction, errors in the placement of the noose or ligature, or other mistakes,

accidental deaths sometimes occur. Data from the United States, England, Australia, and Canada indicate that one to two hypoxyphilia-caused deaths per million population are detected and reported each year." *Id.* (quoting DSM-IV § 302.83, at 529). But the "use of asphyxia to heighten sexual arousal more often than not [has] a nonfatal outcome." *Todd, 47 F.3d at 1457* (citing Hazelwood, Dietz & Burgess, Autoerotic Fatalities 49 (1983)); *see also Tommie*, 619 S.W.2d at 202; *Kennedy v. Wash. Nat'l Ins. Co.*, 136 Wis. 2d 425, 401 N.W.2d 842, 845 (Wis. Ct. App. 1987). Autoerotic asphyxiation "is a repetitive pattern of behavior that individuals engage in over a period of years," and generally "the intent of the individuals performing this act is not death." *Parker v. Danaher Corp.*, 851 F. Supp. 1287, 1290 (W.D. Ark. 1994). When performed successfully, the act results only in a temporary decrease in oxygen levels that causes light-headedness, and "usually does not leave visible marks on the neck." *Am. Bankers*, 181 F.3d at 933.

IV. Policy Exclusions

The policy exclusion at issue here contains two separate exclusions - one for "suicide or any attempt at suicide" and one for "loss caused in whole or in part by, or resulting in whole or in part from ... intentionally self-inflicted injury or any attempt at intentionally self-inflicted injury." We consider each in turn.

A. Exclusion for Suicide

AIG argues that the policy's suicide exclusion precludes recovery because death by hanging was a "natural and foreseeable consequence" of Mr. Padfield's intentional act. It suggests that the behavior was "so reckless and so likely to result in death" that it is "necessary and appropriate to call the reasonableness of [Mr. Padfield's] expectation of survival into question." Accordingly, AIG argues, the death was not an "accident." The policy provides for an "*Accidental* Death Benefit" that is payable "if injury to the Insured Person

results in death within 365 days of the date of the *accident* that caused the Injury" (emphasis added). Thus, if the death was not accidental, the policy is not even triggered, and it is unnecessary to examine the applicability of any exclusion. Alternatively, AIG argues, because the death was not an accident, it was the "functional equivalent of suicide," and therefore the suicide exclusion precludes the payment of benefits.

We disagree. A death or injury may be "deemed 'accidental' under a group accidental insurance policy established under ERISA if the death [or injury] was unexpected or unintentional." 10 Couch on Insurance § 139: 16 (3d ed. 1995 & 2000 Supp.). In determining whether death, or the injury that caused death, was unexpected or unintentional, courts have undertaken an overlapping subjective and objective inquiry. The court first asks whether the insured subjectively lacked an expectation of death or injury. *See Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1088 (1st Cir. 1990) ("Requiring an analysis from the perspective of the reasonable person in the shoes of the insured fulfills the axiom that accident should be judged from the perspective of the insured."). If so, the court asks whether the suppositions that underlay the insured's expectation were reasonable, from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and experiences. *See id.* If the subjective expectation of the insured cannot be ascertained, the court asks whether a reasonable person, with background and characteristics similar to the insured, would have viewed the resulting injury or death as substantially certain to result from the insured's conduct. *See id.*; *Todd*, 47 F.3d at 1456.

Courts applying the federal common law of ERISA have used a number of slightly different verbal formulations to describe the objective portion of the inquiry. *See, e.g., Todd*, 47 F.3d at 1456 (holding that a subjective expectation of

survival is objectively reasonable "if death is not substantially certain to result from the insured's conduct"); *Wickman*, 908 F.2d at 1088-89 (stating a court should determine whether a reasonable person situated as the insured was "would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct"); *Bennett*, 956 F. Supp. at 211 (adopting the rule that a subjective expectation of survival is objectively reasonable if death is not "substantially likely" to result from the insured's conduct). Although the difference between the formulations is not great, *see* *Todd*, 47 F.3d at 1456 (noting that the "substantially certain" test "followed the essence of" the "substantially likely" test), we agree with the Fifth Circuit in *Todd* that the "substantially certain" test is the most appropriate one, for it best allows the objective inquiry to "serve[]as a good proxy for actual expectation." *Wickman*, 908 F.2d at 1088.

The undisputed evidence in this case requires us to conclude that Mr. Padfield's death was "accidental," and was thus not a "suicide" within the meaning of the policy. Autoerotic asphyxiation practitioners expect to survive the experience, and there is nothing to suggest that Mr. Padfield subjectively expected otherwise. Though the record is limited, it appears that Mr. Padfield had a history of engaging in this autoerotic behavior and surviving it. Moreover, there is no evidence that he was distraught or experiencing any personal problems. Because death by autoerotic asphyxiation is statistically rare, his expectation of survival certainly was reasonable.

Even if we could not determine Mr. Padfield's subjective expectations, the same conclusion would be warranted under a purely objective analysis because death is not the "substantially certain" result of autoerotic asphyxiation. We agree with the court's holding in *Todd*: Given the uniform medical and behavioral science evidence indicating that autoerotic activity ordinarily has a nonfatal outcome, "the

likelihood of death from autoerotic activity falls far short of what would be required to negate coverage" under an accidental death policy. 47 F.3d at 1456; *see also Bennett*, 956 F. Supp. at 211-12.

Examining the suicide exclusion in its "ordinary and popular sense as would a person of average intelligence and experience," *Babikian*, 63 F.3d at 840, it is clear that the provision does not preclude recovery of benefits. Mr. Padfield "was merely involved in an act designed to enhance his sexual gratification," and we believe that "in the common understanding . . ., [his] death would be regarded as accidental." *Parker*, 851 F. Supp. at 1295. Every court to have considered autoerotic asphyxiation under the federal common law of ERISA has concluded that it is not excluded from coverage by a suicide exclusion. *See Todd*, 47 F.3d at 1456-57; *Bennett*, 956 F. Supp. at 212-13; *Parker*, 851 F. Supp. at 1295; *Fawcett v. Metro. Life Ins. Co.*, 2000 U.S. Dist. LEXIS 10061, No. C-3-97-540, 2000 WL 979994 at *4 (S.D. Ohio June 28, 2000).[1] The district court did not err in so holding.

B. Exclusion for "Intentionally Self-Inflicted Injury"

AIG also argues that Mrs. Padfield may not receive benefits under the policy because Mr. Padfield's death was the result of an "intentionally self-inflicted injury." The district court held for AIG on this ground. We disagree.

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[1] AIG cites to non-ERISA cases decided under state law that hold that a reasonable person would have foreseen that death could result from autoerotic asphyxiation and therefore such a death is not an "accident." *See, e.g., Sigler v. Mutual Benefit Life Ins. Co.*, 663 F.2d 49, 50 (8th Cir. 1981) (applying Iowa law); *Int'l Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084, 1087 (4th Cir. 1981) (applying Virginia law). For the reasons stated in the text, we do not agree with the conclusion of these state-law cases that autoerotic asphyxiation deaths are not accidental as that term is ordinarily understood.

Courts addressing the exclusion for "intentionally self-inflicted injury" in cases of death during autoerotic asphyxiation have reached conflicting conclusions. Two courts applying state law have held that individuals who died while engaging in the practice did not "intentionally inflict" upon themselves "bodily injury in the normal and usual meaning of that term." *Tommie*, 619 S.W.2d 199, 203 (Texas Ct. App. 1981); *see also American Bankers Insurance Company of Florida v. Gilberts*, 181 F.3d 931, 933 (8th Cir. 1999). Most recently, in *American Bankers Insurance Company of Florida v. Gilberts*, the Eighth Circuit, applying Minnesota law, interpreted a policy that, like the one here, specifically excluded a loss that resulted from "an intentional self-inflicted injury," and defined "injury" as a "bodily injury which is . . .caused by an accident." 181 F.3d at 932. The *American Bankers* court applied a state-law standard that largely parallels the standard used under ERISA federal common law for the interpretation of policy provisions, noting that, under Minnesota law, "terms in insurance policies are to be given the plain and ordinary meaning as would be ascribed to them by a reasonable insured." *Id. at 933.* The court noted that autoerotic asphyxiation, when successfully performed, involves no visible marks on the neck and only de minimis tissue damage, and that there was no evidence "that the procedure involves pain of any kind." *Id.* Accordingly, it held that it could not be said as a matter of law "that a temporary decrease in the oxygen level of the brain, of itself, is a bodily injury in the ordinary sense of the term." *Id.* Two other courts applying state law disagree. *See Sims v. Monumental Gen. Ins. Co.*, 960 F.2d 478, 480 (5th Cir. 1992) (applying Louisiana law and holding that "partial strangulation" during autoerotic asphyxiation is an injury in and of itself and that an "intentionally self-inflicted injury" exclusion precludes recovery); *Sigler v. Mutual Benefit Life Ins. Co.*, 663 F.2d 49, 50 (8th Cir. 1981) (holding the same under Iowa law).

In the face of this divergence of opinion in cases applying state law, two federal district courts applying the federal common law of ERISA, under an abuse of discretion standard, have held that plan administrators did not act arbitrarily and capriciously in precluding recovery under "intentionally self-inflicted injury" exclusions in cases of autoerotic asphyxiation. *See Hamilton v. AIG Life Ins. Co.*, 182 F. Supp. 2d 39, 49-50 (D. D.C. 2002) ("the fact that reasonable minds might differ on the question simply proves that it is not an abuse of discretion to decide that partial strangulation is an injury"); *Fawcett*, 2000 U.S. Dist. LEXIS 10061, at *7 ("The possibility that reasonable minds may differ on this issue merely confirms that [the insurance company] did not act arbitrarily and capriciously" in finding that partial strangulation is an injury and that an "intentionally self-inflicted injury" exclusion precludes recovery). In very recent cases, two district courts applying a de novo standard of review have held that an insured's death while engaging in autoerotic asphyxiation was excluded under provisions similar to the "intentionally self-inflicted injury" provision in this case. *See Critchlow v. First Unum Life Ins. Co. of America*, 2002 U.S. Dist. LEXIS 6600, No. 00-CV-6168 L, 2002 WL 553806, at *4-6 (W.D.N.Y. March 29, 2002); *Cronin v. Zurich American Ins. Co.*, 189 F. Supp. 2d 29, 39 (S.D.N.Y. 2002). Both courts acknowledged the "conflicting conclusions" reached by courts interpreting such exclusions in the context of autoerotic asphyxiation. *Cronin*, 189 F. Supp. 2d at 38; *see also Critchlow*, 2002 U.S. Dist. LEXIS 6600, 2002 WL 553806, at *6.

As discussed above, we apply a de novo standard of review. Applying that standard, we agree with the courts that have held that autoerotic asphyxiation is not an intentionally self-inflicted injury. Federal courts deciding ERISA claims apply the subjective/objective test discussed above to determine, not only whether a death was accidental, but also whether an injury was "intentionally self-inflicted." The

district court correctly observed that this case hinges on whether the physical consequences that Mr. Padfield intended were injuries. If they were injuries, and if they led to his death, the exclusion applies, and AIG correctly denied benefits. All of the evidence indicates that if the events of February 9, 1999 had gone as Mr. Padfield intended, he would have experienced a temporary deprivation of oxygen, a euphoric light-headedness from the exposure to the industrial solvent, and an intensified sexual experience. His oxygen level would then have been restored, his euphoric state would have subsided, and he would have returned home uninjured. None of these consequences is an "injury" as that term is defined in the "ordinary and popular sense [by] persons of average intelligence and experience." *Babikian*, 63 F.3d at 840.

As it turned out, of course, events did not go as Mr. Padfield intended. He did not return to consciousness, and the intended physical consequences led to unintended injuries. The necktie tightened, thereby injuring the tissue in his neck and leaving a visible mark; his blood flow was cut off for a sustained period; and he died from a lack of oxygen. The critical question is whether these injuries, which resulted in his death, were "intentionally self-inflicted" within the meaning of the policy exclusion. We believe that the evidence shows that Mr. Padfield's injuries were not "intentionally self-inflicted."

As previously discussed, Mr. Padfield had no subjective intent to cause the injuries that resulted in his death. The next question is whether the suppositions underlying Mr. Padfield's subjective intent were objectively reasonable. *See Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 463 (7th Cir. 1997). We conclude that they were. A reasonable person with background and characteristics similar to Mr. Padfield's would not have viewed the strangulation injury that resulted in his death as "substantially certain" to result from his conduct. *Todd*, 47 F.3d at 1456 (stating that an expectation

is objectively reasonable if the outcome is not "substantially certain to result from the insured's conduct").

AIG emphasizes that Mr. Padfield voluntarily engaged in a risky activity. This is true, but voluntary risky acts resulting in injury are not necessarily acts that result in "intentionally self-inflicted injury." The analysis of the Seventh Circuit in *Santaella* demonstrates this proposition. The insured in *Santaella* died from an overdose of a prescription pain medication. The record showed that she had voluntarily taken a dangerously large amount of the drug, but the amount was of a size that usually indicated an accidental rather than a deliberate overdose. 123 F.3d at 465. The insurance policy contained an exclusion for death resulting from "intentionally self-inflicted injury." *Id.* Defining that phrase "in the ordinary and popular sense, in the way that a person of average intelligence and experience would interpret" it, *id. at 463,* the court held that the record would not support a determination that the insured "did anything other than make a fatal mistake." *Id. at 465.* "It is undisputed that she took the drug voluntarily, but nothing in the record indicates that she intended to take an overdose or that she intended to inflict injury on herself." *Id.*

This case is analytically identical to *Santaella*. Mr. Padfield voluntarily engaged in actions that led to a fatal injury, but his reasonable expectation was that this behavior would not have resulted in "injury" as that word is commonly defined. Given both the usual pattern of autoerotic asphyxiation and the statements by Mrs. Padfield, the undisputed facts in this case show that Mr. Padfield, having performed the act in the past without inflicting any injury, had a reasonable expectation that he would be able to do so again. Thus, like the insured in *Santaella*, Mr. Padfield "did not die from an intentionally self-inflicted injury." *Id. at 465.* Rather, he made a "fatal mistake." *Id.* "Generally, insureds purchase accident insurance for the very purpose of obtaining

protection from their own miscalculations and misjudgments." *Wickman*, 908 F.2d at 1088.

Conclusion

Congress, in adopting ERISA, expected that "a federal common law of rights and obligations under ERISA-regulated plans would develop[.]" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987). Based on this common law, we hold that the suicide exclusion does not preclude recovery. Likewise, guided both by the subjective/objective analysis employed in other ERISA cases and by the mandate that we read provisions in an ERISA-governed policy in their "ordinary and popular sense," *Babikian, 63 F.3d at 840,* we also hold that recovery is not precluded by the exclusion for death resulting from "intentionally self-inflicted injury."

The district court's orders granting summary judgment to insurer AIG and denying summary judgment to Mrs. Padfield are both REVERSED.

LEAVY, *Senior Circuit Judge*, concurring in part and dissenting in part:

I concur in the majority's conclusion in Part IV (A) that Mr. Padfield's death was not a "suicide" within the meaning of the policy. However, I disagree with the majority's conclusion in Part IV (B) that the injuries resulting in Mr. Padfield's death were not "intentionally self-inflicted." I would hold, as a matter of law, that Mr. Padfield's act of tying a necktie around his neck with the intent to restrict the flow of oxygen to his brain was an intentionally self-inflicted injury which resulted in his death. The policy excludes coverage for such a loss.

A. *The Policy Terms*

The policy provides coverage as follows: "If Injury to the Insured Person results in death within 365 days of the date of the accident that caused the Injury, the Company will pay

100% of the Principal Sum." The policy defines "injury" as "bodily injury caused by an accident." The policy excludes coverage for "any loss caused in whole or in part by, or resulting in whole or in part from the following: ". . . "any intentionally self-inflicted injury or any attempt at intentionally self-inflicted injury."

An intentionally self-inflicted injury has three elements: (1) an act upon oneself; (2) done with intent to injure; and (3) an injury. If the act is done with intent to kill (not injure) one's self, this is suicide, and the policy excludes coverage for such a loss. The majority states that "this case hinges on whether the physical consequences that Mr. Padfield intended were injuries," and concludes that "the intended physical consequences led to unintended injuries." The policy language does not speak in terms of "intended physical consequences" or "unintended injuries." When interpreting terms in ERISA insurance policies, we adopt a reasonable interpretation of the policy language and avoid torturing or twisting the language of the policy. *See Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990). The only inquiry we should be making under the terms of the policy is whether Mr. Padfield's injuries, which resulted in his death, are intentionally self-inflicted.

The majority concludes Mr. Padfield intended to tighten the necktie, but did not intend to injure the tissue in his neck, leave a visible mark, or cut off his blood flow for a sustained period, which were "fatal mistakes." For such a proposition, the majority relies upon *Santaella v. Metro Life Ins. Co.*, 123 F.3d 456 (7th Cir. 1997) where the court held the insured's death from the voluntary ingestion of propoxyphene (commonly known as Darvon) was not an intentionally self-inflicted injury. *Santaella*, 123 F.3d at 465. In *Santaella*, there was nothing in the record to indicate that the insured intended to inflict injury upon herself by ingesting the legal, prescription painkiller. While the record in *Santaella* revealed that the insured had abused drugs five years before

and had a damaged spleen, there was nothing in the record indicating that, in the incident which resulted in her death, the insured intended to injure herself. The insured had taken a relatively low level of the prescription drug for a fatal dosage, and the pathologist noted that a person could develop increasing levels of tolerance for the prescription and thus could take mistakenly a lethal dose of the drug.[1] *Santaella*, 123 F.3d at 464.

By contrast, in the present case, Mr. Padfield intended to restrict the flow of oxygen to his brain by self-asphyxiation with a necktie. This intentional act inflicted an injury from which Mr. Padfield never recovered. Whether such an intentional act leaves ligature marks on the deceased's body is of little or no significance. Mr. Padfield's intentional act of injuring his brain rendered it incapable of functioning. His intentional act caused injury to a live organ. This injury to his brain rendered it incapable of saving him from death. This is an intentionally self-inflicted injury which resulted in death. Such a loss is not covered under the terms of the policy.

B. *The Decision is Contrary to ERISA Case Law*

None of the ERISA cases concerning policy coverage for death from autoerotic asphyxiation support the majority's position. There are, to date, seven ERISA cases which concern policy coverage for a death from autoerotic asphyxiation. In four recent cases, which are factually and procedurally similar to the present case, death resulting from

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[1] Accidental deaths resulting from autoerotic asphyxiation are factually and analytically distinguishable from accidental deaths resulting from drugs. In our society, people regularly ingest prescription and nonprescription drugs with widely disparate results. Some accidental death insurance policies specifically exclude coverage for the taking of drugs or asphyxiation from the inhaling of gas, when done on a voluntary basis, but the exclusion does not apply to drugs that are taken on the advice of a physician. *See Schadler v. Anthem Life Insurance Company*, 147 F.3d 388, 392 (5th Cir. 1998).

autoerotic asphyxiation was excluded from coverage because the policy contained a self-inflicted injury exclusion: *Critchlow v. First Unum Life Ins. Co.*, 2002 U.S. Dist. LEXIS 6600, 2002 WL 553806 (W.D.N.Y. March 29, 2002); *Cronin v. Zurich American Ins. Co.*, 189 F. Supp. 2d 29, 2002 WL 244605 (S.D.N.Y. Feb. 19, 2002); *Hamilton v. AIG Life Insurance Company*, 182 F. Supp. 2d 39 (D.D.C. 2002); *Fawcett v. Metro. Life Ins. Co.*, 2000 U.S. Dist. LEXIS 10061, 2000 WL 979994 (S.D. Ohio June 28, 2000). In these four cases, the policy at issue contained *both* a policy exclusion for suicide *and* a policy exclusion for intentionally self-inflicted injuries, which are virtually identical to the summary plan exclusions in this case.

In *Critchlow*, the court, reviewing *de novo*, concluded that the decedent's death was an "intentionally self-inflicted injury." *Critchlow*, 2002 U.S. Dist. LEXIS 6600, 2002 WL 553806 *8. The court reasoned:

> In support of her position, plaintiff points to evidence that decedent himself had engaged in this practice on more than once occasion prior to February 26, 1999. This evidence indicates that it is possible to engage in autoerotic asphyxiation without dying, or even without losing consciousness. From that evidence, plaintiff argues that such activity need not cause injury to the person engaged in it. That one *may* survive autoerotic asphyxiation without suffering any major injury is not dispositive, however. The fact remains that autoerotic asphyxiation, as practiced by decedent, requires not just a slight amount of pressure, or a negligible reduction of the flow of oxygen, but a significant deprivation of oxygen to the brain - in other words, strangulation. Any definition of "injury" that excludes strangulation - whether fatal or not - is simply unreasonable.

2002 U.S. Dist. LEXIS 6600, 2002 WL 553806 at *7 .

In *Cronin*, the court, reviewing *de novo*, held that the purposefully self-inflicted injury exclusion encompassed the act of autoerotic asphyxiation. *Cronin*, 189 F. Supp. 2d 29, 2002 WL 244605 *9 . The court reasoned:

> Although Cronin may not have intended to cause *permanent* injury, his intention to restrict the flow of blood and oxygen to his brain in order to impair his mental processes was a "hurt" to his physical and mental being, and risked death. Causing oneself "hurt" or "harm" is an injury to one's own body whether inflicted in the search for delight or in the search for pain; both expose the practitioner to a substantially increased risk of accidental death. Cronin may have intended that the "mischief" he caused himself could be reversed by timely intervention, but his "hurt" so affected his state of being as to become irreversible. Under the plain language of the policy exclusion, Cronin's death was "caused by, contributed to, or resulted from a purposely self-inflicted injury."

189 F. Supp. 2d 29, 2002 WL 244605 *9.

In *Hamilton* and *Fawcett*, the plan administrator concluded that the insured's death resulting from autoerotic asphyxiation was an "intentionally self-inflicted injury" that resulted in death, thus precluding coverage. The *Fawcett* court stated:

> In the foregoing examples, death was unintended and, therefore, accidental. Similarly, in the present case, Mr. Fawcett derived some sexual satisfaction from intentionally restricting the flow of oxygen to his brain, and he intended to live to enjoy it. *His* death was likewise unintended, and hence, accidental. Nevertheless, the action that he took to achieve the benefit was an intentionally self-inflicted injury that resulted in his death, despite his intentions to the

> contrary. Accordingly, the terms "accidental death" and "intentionally self-inflicted injury" are not mutually exclusive. This reasoning is best illustrated through [the] following syllogism:
>
> 1) Mr. Fawcett's death was caused by the intentional restriction of oxygen to his brain.
>
> 2) To restrict the flow of oxygen to the brain is to inflict injury upon oneself.
>
> 3) Therefore, Mr. Fawcett's death was caused by an intentionally self-inflicted injury.

2000 U.S. Dist. LEXIS 10061, 2000 WL 979994,*6 (emphasis in original).

Both the *Fawcett* court and the *Hamilton* court were reviewing the plan administrator's denial of coverage under the abuse of discretion standard, and, in this case, like the *Critchlow* and *Cronin* cases, we are reviewing the denial of coverage de novo. The facts and reasoning in these four ERISA cases are directly applicable to this case, and, upon our de novo review, the result should be the same. To intentionally restrict the flow of oxygen to the brain by self-asphyxiation, even without intent to be fatal, is to inflict, intentionally, injury upon oneself.

Three additional ERISA cases analyze accidental insurance coverage for death from autoerotic asphyxiation and state, in dicta, that coverage *would have been denied* had the policy contained an exclusion for intentionally self-inflicted injuries. In those cases, *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995); *Bennett v. Am. Int'l Life Assurance Co. of N. Y.*, 956 F. Supp. 201 (N.D. N.Y. 1997); and *Parker v. Danaher Corp.*, 851 F. Supp. 1287 (W.D. Ark. 1994), the insurance policies contained coverage for deaths by accident, with an exclusion of coverage for suicide, but

contained no exclusion of coverage for intentionally self-inflicted injuries.[2]

C. *The non-ERISA case law does not support the majority's holding*

The majority fails to explain adequately why it rejects federal ERISA cases involving death from autoerotic

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[2] The Fifth Circuit in *Todd* stated:

> We add this postscript to this part of the case. It may be that all this writing is necessary to affirm this part of the judgment for appellee, but it is doubtful that it should have any longlasting significance for deciding cases like this. The life insurance companies have ample ways to avoid judgments like this one.

47 F.3d at 1457.

The *Bennett* court cited *Sims v. Monumental General Ins. Co.*, 960 F.2d 478, 480 (5th Cir. 1992), which held that partial strangulation is an injury in and of itself and the policy excluded death resulting from an intentionally self-inflicted injury. The *Bennett* court stated that "because there is not self-inflicted injury exclusion in the instant policy, and because the *Sims* court never reached the issue of accidental death, its reasoning is of little value here." *Bennett*, 956 F. Supp. at 207. The *Bennett* court also cited the *Todd* court's postscript: "The life insurance companies have ample ways to avoid judgments like this one."

956 F. Supp. at 210.

The court in *Parker* stated that the insured would not be covered had the policy contained an exclusionary clause for injury resulting from an intentionally self-inflicted injury. The court stated:

> We hasten to say that we are not faced in this case with an exclusionary clause for injury resulting directly or indirectly from an intentionally self-inflicted injury. The [foreseeability] standard advanced by the defendants merges in the court's view the policy definition of injury with typical policy language, not present herein, excluding loss caused by intentionally self-inflicted injury.

851 F. Supp. at 1295.

asphyxiation, and instead follows two lone non-ERISA cases which apply state law. The majority overstates this case law support when it says that two courts applying state law "have held" that autoerotic asphyxiation is not an intentionally self-inflicted injury. In the two non-ERISA cases relied upon by the majority, the courts *left it to a jury* to decide whether autoerotic asphyxiation is an intentionally self-inflicted injury. In the present case, the majority goes beyond *any* reported case by holding that, *as a matter of law*, autoerotic asphyxiation is not an intentionally self-inflicted injury.

The majority relies upon *American Bankers Ins. Co. of Florida v. Gilberts*, 181 F.3d 931 (8th Cir. 1999), where the court, applying Minnesota law, reversed the district court's grant of summary judgment for the insurance company and remanded for trial on the issue of whether the intended act of the temporary change in blood flow by self-asphyxiation constitutes a bodily injury. *American Bankers*, 181 F.3d at 933. The court did not "hold" that autoerotic asphyxiation is not an intentionally self-inflicted injury. The court noted that the two parties' expert witnesses were split on the question of whether the change in blood flow is an injury. The court stated that there was "essentially no evidence advanced for purposes of summary judgment (but there may be at trial) that an individual's body is any different after the performance of partial asphyxia in this manner than it was before . . ." *Id.*

The majority also relies upon *Connecticut Gen. Life Ins Co. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981), which was in a much different procedural posture than this case. The Texas intermediate appellate court was reviewing a jury's finding that the decedent's death resulting from autoerotic asphyxiation was neither the result of a suicide nor the result of a self-inflicted injury. The Texas court concluded that if there was "any probative evidence to support that finding, we must uphold the verdict in that respect." *Tommie*, 619 S.W.2d at 203. The court noted that

Mr. Tommie placed a pad between the rope and his neck and there was "no evidence that the rope inflicted any external injury to his body." *Id.* The procedural posture of the instant case makes it readily distinguishable from *Tommie*.

If one looks to cases applying state law rather than ERISA cases, there are two cases which hold that, as a matter of law, an insured's death from autoerotic asphyxiation was not a covered loss because the policy excluded death from "intentionally self-inflicted injury." In *Sims v. Monumental Gen. Ins. Co.*, 960 F.2d 478, 480 (5th Cir. 1992), the Fifth Circuit, applying Louisiana law, stated that the only question was whether partial strangulation was an "injury." The court cited the undisputed expert opinion that partial strangulation deprived the brain of valuable oxygen, and the court concluded that partial strangulation is an injury in and of itself. *Sims*, 960 F.2d at 480. *See also Sigler v. Mutual Benefit Life Ins. Co.*, 663 F.2d 49, 50 (8th Cir. 1981) (Applying Iowa law, death from autoerotic asphyxiation was not a covered loss as a matter of law because the policy excluded coverage for "intentionally, self-inflicted injury of any kind.").

CONCLUSION

Because the majority's holding is not supported by the policy language, is contrary to ERISA case law, and is not supported by the holdings in non-ERISA case law, I would affirm the district court's grant of summary judgment in favor of AIG.

I respectfully dissent.

Appendix B: Opinion of the District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-00-4612-SVW

JORITA PADFIELD,

Plaintiff,

v.

AIG LIFE INSURANCE COMPANY, a corporation, DOES 1 through 10, inclusive,

Defendants.

[Filed November 22, 2000; Entered November 27, 2000]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff Jorita Padfield ("Ms. Padfield" as beneficiary moves for summary judgment on Defendant AIG's ("AIG") liability on an accident insurance policy covering her late husband, Mr. Padfield. AIG has filed its own cross-motion for summary judgment alleging that liability for Mr. Padfield's death by autoerotic asphyxiation is excluded by

the terms of the policy. Ms. Padfield is a covered beneficiary of a health and welfare policy regulated by the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. § 1001, et seq. The question presented to this Court is whether the policy exclusion for "suicide" or "intentionally self-inflicted injury" bars recover for death by autoerotic asphyxiation.

II. Standard of Review

The standard of review of benefit eligibility determinations will vary in accordance with the extent of the fiduciaries' power to construe the terms of the benefit plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-115 (1989). When the fiduciaries do not have any discretion to construe the terms of the plan, courts make a de novo review of their interpretations. *Id.* at 115. The policy in question does not grant AIG discretion to interpret its provisions nor to decide eligibility for its benefits. Therefore, review by this Court of AIG's interpretation of its exclusionary clauses is de novo rather than for abuse of discretion. *Kearney v. Standard*, 175 F.3d 1084 (9th Cir. 1999).

III. Choice of Law

Federal court[s] are to apply the federal common law to govern questions of insurance policy interpretation under ERISA regulated plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). The federal common law of ERISA preempts state law in regulating the interpretation of ERISA benefit plans. *Shaw v. Delta Air Lines*, 463 U.S. 85, 98 (1983). The Court finds, and parties agree, that federal common law applies to this case.

[IV.] Statement of Facts

The facts are not in controversy. On February 9th, 1999, Mr. Padfield drove his van to a street bounded by vacant lots. He sat on the floor behind the front passenger seat and

removed his pants. Around his neck, Mr. Padfield tied a necktie. He tied the other end to a door hinge. Three days later Mr. Padfield was found by police, asphyxiated. At autopsy, the only external trauma was caused by the necktie. When Mr. Padfield was found there was a small bottle of Chlorohexanol, an industrial solvent, and various sexually-oriented items near him. Post-mortem tests found the industrial solvent in his blood. AIG does not contest that Mr. Padfield intended to kill himself.

Ms. Padfield made a claim for the policy's benefits. That claim was denied by AIG because of the exclusion in the policy for either "suicide" or "intentionally self-inflicted injury." Ms. Padfield appealed the decision within AIG and AIG again denied Ms. Padfield the benefits of the policy. The parties['] cross-motions for summary judgment are now before this Court.

[V.] Discussion

The full text of the exclusion reads as follows: "this Policy does not cover any loss caused in whole or in part by, or resulting in whole or in part from the following: suicide or any attempt at suicide or intentionally self-inflicted injury or any attempt at self-inflicted injury." AIG argues that Mr. Padfield's death is excluded from coverage because either: (1) the death was a suicide since a reasonable person would have recognized that his action could result in his death (2) that the self-inflicted injury exclusion applies because Mr. Padfield intended to injure himself.

The federal common law on the issue of insurance benefits is still in its formative stage but "must embody common-sense canons of contract interpretation." *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir. 1989). One of these canons is that this Court should interpret terms in ERISA insurance policies in an ordinary and popular sense as would a person of average intelligence and experience. *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir.

1990). Although ambiguous terms in an insurance contract will be construed in favor of the insured, if there is no ambiguity this Court must give effect to the words which denote the bargain struck between the parties. *Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 431 (7th Cir. 1994). See also *Allstate Insurance Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985).

1. SUICIDE EXCEPTION

First, AIG argues that Mr. Padfield is excluded from coverage because his death was "a suicide or an attempt at suicide." Black's Law Dictionary Sixth Edition defines suicide as "the deliberate termination of one's existence." The Webster's II New Riverside University Dictionary defines suicide "as an act or instance of intentionally killing oneself." Therefore, if Mr. Padfield truly attempted suicide and succeeded, then he must have expected or intended his actions to result in his death. It is uncontroverted by the parties that Mr. Padfield did not expect to die or intend to kill himself.

Although the policy exception in this case excludes "suicides or any attempt at suicide," AIG cite[s] cases where the policy language in question was whether death by autoerotic asphyxiation was "accidental," or by "accidental means." AIG does not address whether it believes that the word suicide, accidental, and accidental means are synonymous under these circumstances.

AIG cites *Runge v. Metro Life Ins. Co.*, 537 F.2d 1157 (4th Cir. 1976) that interprets a policy exclusion for death by accidental means in support of its claim that Mr. Padfield committed suicide. A policy exclusion for accidental means; however, is quite different than a policy exclusion for suicide. A number of courts have drawn a distinction between "accident" and "accidental means" exclusions in an insurance policy on the theory that although the result of an intentional act may be an "accident," the act itself, that is, the

cause of the result, where intended, is not an "accidental means." See e.g., *Senkier v. Hartford Life & Acc. Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991). This line of cases holds that where an unusual or unexpected result, such as death, occurs by reason of the doing by the insured of an intentional act, such as asphyxiation, the ensuing injury or death is not caused through accidental means and coverage is barred. This reasoning is completely inapposite here because the policy language is different. Therefore, AIG's citation to cases discussing policy exclusions for death by autoerotic asphyxiation under an accidental means exclusion are irrelevant to our interpretation of an exclusion for suicide.

Although cases interpreting an exclusion for accidental means are not relevant to interpretation of a suicide exclusion, AIG's implicit argument that the term accidental is synonymous with the term suicide for purposes of reliance on cases discussing autoerotic asphyxiation has more plausibility. AIG argues, in reliance on cases interpreting an exclusion for accidental death, that even though Mr. Padfield did not intend or expect his behavior to result in death the activity leading to death was so inherently risky that a reasonable person in Mr. Padfield's shoes would have feared death. Defendant cites cases interpreting an accidental death provision involving death by both autoerotic asphyxiation and other "extreme means of gratification" which have found, in summary, that a person is presumed to intend the nearly inevitable consequences of their actions.

For example, the First Circuit held that the death of a man who climbed over the guardrail of a bridge to hang by one hand was not accidental because he "either expected the result, or a reasonable person in his shoes would have expected the result, and that any other expectation would be unreasonable." *Wickman v. Northwestern Nat'l Life Ins. Co.*, 908 F.2d 1077, 1089 (1st Cir. 1990). See also, *Arnold v. Metro Life Ins. Co.*, 970 F.2d 360 (7th Cir. 1992) (death from Russian roulette foreseeable rather than accidental).

AIG's analogy of Mr. Padfield's behavior to the death of one who participates in Russian roulette with a loaded weapon and hangs underneath a bridge by one hand fails. The Court disagrees that Mr. Padfield's conduct rises to that same level of reckless abandon present in those cases.

Even if we accept AIG's contention that, as a matter of federal common law, Mr. Padfield's death is not accidental if it is a natural and foreseeable consequence of Mr. Padfield's actions it is disputed by the parties whether or not death is a natural and foreseeable consequence of Mr. Padfield's conduct. Therefore, the Court cannot find, as a matter of law, that engaging in this autoerotic act mean[s] that death is as likely as it is in Russian roulette and one-handed acrobatics off of high bridges.

Finally, two courts, applying federal common law, directly contradict AIG's position having found that death by autoerotic asphyxiation is accidental. In *Todd*, a case interpreting the federal common law of ERISA, the Fifth Circuit found that death by autoerotic asphyxiation was accidental. *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995) (although autoerotic activity may be risky, death is not a normal, expected result of this behavior). See also, *Parker v. Danaher Corp.*, 851 F. Supp. 1287, 195 (D. Ark. 1994) (accidental).

Although three cases, interpreting state law, found otherwise those case[s] are not binding on this court. See, *Sigler v. Mut. Benefit Life Ins. Co.*, 663 F.2d 49, 53 (8th Cir. 1981) (death by autoerotic asphyxiation not accidental under Iowa law "since a reasonable person would have recognized that his action could result in his death."), *Int'l Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981) (same interpreting Virginia law) and *Kennedy v. Washington Nat'l Ins. Co.*, 401 N.W.2d 842, 846 (Ct. App. 1987) (same interpreting Washington law).

Therefore, based upon the above analysis, and the Fifth Circuit's holding in *Todd* that autoerotic asphyxiation is accidental, the Court finds that death by autoerotic asphyxiation, under the federal common law of ERISA, falls outside the policy exception for suicide. Nevertheless, Ms. Padfield is unable to recover because Mr. Padfield's actions fall within the other policy exclusion for an "intentionally self-inflicted injury."

2. Exclusion For Self-Inflicted Injury

For death of an insured to fall within an intentional act exclusion, it is not enough to merely show that Mr. Padfield intended the act which resulted in the injury. For the exclusion of intentionally self-inflicted injury to apply Mr. Padfield must have intended to injure himself and that injury must have caused his death.

Although Mr. Padfield did not intend to produce the unconsciousness that resulted in his death, it is uncontested that Mr. Padfield specifically intended to temporarily restrict his air supply to heighten the sensations of masturbation. Therefore, if this partial strangulation is an injury, the exclusion for intentionally self-inflicted will apply.

The Court believes that a reasonable jury must find that a partial strangulation is an injury. The Court adopts the reasoning in *Sims v. Monumental Gen. Ins. Co.*, 960 F.2d 478, 480-481 (5th Cir. 1992), a non-ERISA case decided under Louisiana law, where the Fifth Circuit found that the partial strangulation caused by autoerotic asphyxiation is an injury for the purposes of an intentionally self-inflicted injury exclusion. In finding that it did, the Fifth Circuit noted that "the type of strangulation desired by [the insured] damages

tissues in the neck and deprives the brain of oxygen."[1] *Id.* at 479.

The Fifth Circuit looked to criminal law to support its analysis. It observed that if the decedent had come before the court and proved that a robber had partially strangulated him, the court would have had no trouble finding that the decedent had been injured. In so holding, the Fifth Circuit relied upon a number of state criminal law cases that found that partial strangulation was an injury. See also, *Sigler v. Mutual Benefit Life Ins. Co.*, 663 F.2d 49 (8th Cir. 1981) (concluding that death due to autoerotic asphyxia fell within a policy exclusion for "intentionally self-inflicted injury of any kind.").

Therefore, the Court finds that the act of partial strangulation constitutes an injury for purposes of the policy exclusion. Mrs. Padfield does not contest that partial strangulation is an injury. Mrs. Padfield's primary contention is that the policy's exclusion for "intentionally self-inflicted injury" is ambiguous. She then argues that based upon the rule of *contra [proferetem]*, ambiguities in the policy should be construed against the insurance company. Although plaintiff is correct that an ambiguous term in an insurance contract will be construed in the favor of the insured, if there is no ambiguity this Court must give effect to the words which denote the bargain struck between the parties. *Bullwinkel v. New England Mut. Life Ins. Co.*, 18 F.3d 429, 431 (7th Cir. 1994).

Here the clause at issue, "intentionally self-inflicted injury" is not ambiguous. The plain meaning of the clause requires that Mr. Padfield has only to intend to injure himself

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[1] Although *Sims* was a diversity action decided under Louisiana law, the only disputed issue in the case was "whether a partial strangulation is an injury." 960 F.2d at 480. Nothing about this conclusion suggests that it rested upon any unique aspect of Louisiana law.

and that injury have sufficient causal connection to his death for the exclusion to apply.

Although Ms. Padfield fails to argue that partial strangulation is not an injury, Ms. Padfield argues that the self-inflicted injury exclusion does not apply because death "is not the substantially certain result of the activity that killed Mr. Padfield." Plaintiff relies on the Seventh Circuit case of *Morton v. Smith*, 91 F.3d 867 (7th Cir. 1996). Plaintiff cites *Morton* for the proposition that an intentionally self-inflicted injury is an injury that is [the] "substantially certain result of an intentional act." Because, according to Plaintiff, death was not the substantially certain result of the activity that killed Mr. Padfield, the exclusion does not apply.

The plaintiff misreads *Morton*. In *Morton*, the plaintiff jumped off the eight foot high roof of a bar and broke his leg. The Court, reviewing a policy under an abuse of discretion standard, stated, in dicta, that it might adopt the injured party's argument that his injury was not substantially certain to result from his intentional act had the review been de-novo. Plaintiff had argued that he had jumped over many items taller than the one that caused his injury and never hurt himself in the past. The argument that the Court stated that might accept, however, is of little help to Ms. Padfield. In this case, the injury in question is the asphyxiation itself, not the death. The Court in *Morton* basically stated that it might accept the argument that a broken leg is not the natural and probable consequence of jumping off an eight foot high roof. However, in *Morton*, the insured did not intend to break his leg. Mr. Padfield did inten[d] to asphyxiate himself. Asphyxiation is the intentional injury in question, here. There is no dispute that death was not intended and no need to resolve whether death was likely from partial strangulation. The only issue is whether partial strangulation is an injury, because it is clear that Mr. Padfield intentionally strangled himself.

The Court wishes to make clear that it is not adopting defendant's assertion that any activity that might naturally and probably lead to injury is an intentionally self-inflicted injury. Courts have recognized at least three separate tests for determining whether the intent requirement of a self-inflicted injury exclusion is satisfied. The federal common law has not settled on a particular test. First, as advocated by defendants, some jurisdictions infer the insured's intent from the nature and the type of conduct that led to the injury. See e.g., *Linebaugh v. Berdish*, 144 Mich. App. 750 (Mich. Ct. App. 1985). Second, a number of jurisdictions have adopted an objective standard for assessing whether the insured possessed the requisite intent. See e.g., *Pachucki v. Republic Ins. Co.*, 89 Wis. 2d 703, 706 (Wis. Ct. App. 1979). Third, other jurisdictions adopt the approach that the intent requirement of a self-inflicted injury exclusion is satisfied only when the insured committed the act resulting in an injury with the specific intent to bring about that injury. See e.g., *MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166 (N.H. 1984). The Court need not decide which of the three approaches it is adopting, because, all approaches recognize that a person who specifically intends to cause the injury in question satisfies the intent requirement. Therefore, because Mr. Padfield intended to injure himself by asphyxiating himself his recover under the policy is barred by the intentionally self-inflicted injury exclusion.

[VI.] Conclusion

The Court grants AIG motion for summary judgment and denies Mrs. Padfield's motion for summary judgment.

IT IS SO ORDERED.

Appendix C: Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-57054

[Filed: July 3, 2002]

JORITA PADFIELD,

Plaintiff-Appellant,

v.

AIG LIFE INSURANCE COMPANY,

a Corporation,

Defendant-Appellee.

Before: LEAVY, T.G. NELSON and W. FLETCHER, *Circuit Judges*

A majority of the panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc. Judge Leavy would grant the petition for rehearing.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed June 6, 2002, are DENIED.

Appendix D: Excerpts from Group Accident Policy

AIGLIFE AIG Life Insurance Company
One Alico Plaza
Wilmington, DE 19801
(302) 594-2000
(Herein called the Company)

Policyholder: Raytheon Company
Policy Number: PAI 8053931

GROUP ACCIDENT INSURANCE POLICY

* * *

DEFINITIONS

Injury – means bodily injury caused by an accident occurring while this Policy is in force as to the person whose injury is the basis of claim and resulting directly and independently of all other causes in a covered loss.

Insured – means a person: (1) who is a member of an eligible class of persons as described in the Classification of Eligible Persons section of the Master Application; (2) who has enrolled for coverage under this Policy, if required; (3) for whom premium has been paid; and (4) while covered under this Policy. However, an Insured does not include any person covered under this Policy solely as an Insured Dependent as defined in the Family Coverage Rider.

Immediate Family Member – means a person who is related to the Insured Person in any of the following ways: spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, parent (includes stepparent), brother or sister (includes stepbrother or stepsister), or child (includes legally adopted or stepchild).

Insured Person – means an Insured or an Insured Dependent as defined in the Family Coverage Rider.

Physician – means a licensed practitioner of the healing arts acting within the scope of his or her license who is not: 1) the Insured Person; 2) an Immediate Family Member; or 3) retained by the Policyholder.

* * *

BENEFITS

* * *

Accidental Death Benefit. If Injury to the Insured Person results in death within 365 days of the date of the accident that caused the Injury, the Company will pay 100% of the Principal Sum.

* * *

EXCLUSIONS

This Policy does not cover any loss caused in whole or in part by, or resulting in whole or in part from, the following:

1. suicide or any attempt at suicide or intentionally self-inflicted injury or any attempt at intentionally self-inflicted injury;

* * *